79-5584

Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 79-

SANTOS SEPULVEDA,

Petitioner,

-v.-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 79-

SANTOS SEPULVEDA,

Petitioner,

-v.-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

TO THE HONORABLE, THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE UNITED STATES SUPREME COURT.

Petitioner, Santos Sepulveda, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in this proceeding on June 26, 1979, affirming the denial by the United States District Court for the Eastern District of New York of a motion made pursuant to 28 U.S.C. §2255 challenging the legality of a special parole term imposed against petitioner upon his conviction under 21 U.S.C. §846.

## OPINIONS BELOW

The Court of Appeals affirmed the judgment below in a summary opinion included in the judgment and order dated June 26, 1979, which is annexed hereto as Appendix A. The district court filed three unpublished opinions relevant to petitioner's claim, which are reproduced as Appendices D, E, and F hereto.

## JURISDICTION

The judgment of the Court of Appeals was entered on June 26, 1979; as noted, a copy of the judgment is annexed hereto as Appendix A. A timely petition for rehearing with suggestion for rehearing en banc was filed, and both the panel and the full court denied that application on October 5, 1979; the orders thereupon are annexed as Appendices B and C.

## QUESTION PRESENTED

Whether petitioner's sentence of a special parole term in addition to imprisonment upon his conviction under 21 U.S.C. §846 was illegal, in that this section authorizes only a fine and/or imprisonment as punishment.

## STATUTES INVOLVED

1. 21 U.S.C. §846. ATTEMPT AND CONSPIRACY

> Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or the conspiracy.

2. 21 U.S.C. §841(b)(1)(A). PROHIBITED ACTS A -- UNLAWFUL ACTS: Penalties

> In the case of a controlled substance in schedule I or II which is a narcotic drug, such person shall be sentenced to a term of imprisonment of not more than 15 years, a fine of not more than $25,000, or both. If any person commits a violation after one or more prior convictions of him for an offense punishable

under this paragraph, or for a felony under any other provision of this subchapter or subchapter II of this chapter or other law of the United States relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 30 years, a fine of not more than $50,000, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a special parole term of at least 3 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a special parole term of at least 6 years in addition to such term of imprisonment.

3. 21 U.S.C. §841(c). PROHIBITED ACTS A -- UNLAWFUL ACTS: Special Parole Term

A special parole term imposed under this section or section 845 of this title may be revoked if its terms and conditions are violated. In such circumstances the original term of imprisonment shall be increased by the period of the special parole term and the resulting new term of imprisonment shall not be diminished by the time which was spent on special parole. A person whose special parole term has been revoked may be required to serve all or part of the remainder of the new term of imprisonment. A special parole term provided for in this section or section 845 of this title shall be in addition to, and not in lieu of, any other parole provided for by law.

## STATEMENT OF THE CASE

On May 7, 1976, in the United States District Court for the Eastern District of New York, petitioner Santos Sepulveda was sentenced, upon his plea of guilty to conspiring to violate the narcotics laws, 21 U.S.C. §846, to a prison term of five years to be followed by a special parole term of five years.

On April 25, 1978, petitioner filed a pro se motion pursuant to 28 U.S.C. §2255 seeking relief from the five-year special parole term. In this and his later-filed petition for rehearing (June 28, 1978), petitioner contended that the inclusion of a special parole term in a sentence under 21 U.S.C. §846 is illegal because a special parole term, as distinct from fine or imprisonment, is not specified as a proper



form of punishment in that conspiracy statute. He argued that the reference for purposes of sentencing in that statutory section to 21 U.S.C. §841 was limited to the authorized fine or imprisonment, and did not encompass the special parole provision of 21 U.S.C. §841. Thus, the inclusion of special parole in a sentence under 21 U.S.C. §846 was unathorized and illegal.

In decisions and orders filed on June 15 and August 1, 1978, the district judge denied the requested relief and dismissed the petition. The court found that the reference in 21 U.S.C. §846 to the substantive statute -- here, 21 U.S.C. §841 -- authorized any sentence legal under the provisions of the referenced section, and 21 U.S.C. §841 required, in the case of a Schedule I narcotic, a special parole term of at least three years in addition to any prison sentence. Petitioner appealed and sought permission to proceed in forma pauperis. In a decision and order entered December 6, 1978, the district judge granted the petitioner leave to proceed in forma pauperis in the Court of Appeals.

The Legal Aid Society, Federal Defender Services Unit, was thereafter appointed as counsel to petitioner. In the brief for petitioner on appeal, it was argued that the inclusion in petitioner's sentence of a special parole term under 21 U.S.C. §846 was illegal. Before petitioner's case was argued, the Court of Appeals decided Bifulco v. United States, ___ F.2d ___, No. 79-2024, slip op. 2845 (2d Cir. May 30, 1979), certiorari granted, ___ U.S. ___, 48 U.S.L.W. 3241, No. 79-5010 (October 9, 1979). That case considered the precise issue presented in petitioner's appeal and reached a decision, adverse to petitioner's claim, that a sentence under 21 U.S.C. §846 included a special parole term. See id., slip op. at 2847-2852.*

*A copy of the Court of Appeals' decision in Bifulco is annexed hereto as Appendix G.

Petitioner's case was thus affirmed on appeal on constraint of the Court of Appeals' recent decision in Bifulco. In its summary opinion within the judgment of affirmance dated June 26, 1979, the court held:

> This is an appeal from an order denying a motion made pursuant to 28 U.S.C. §2255 challenging the legality of a special parole term that [the district court] imposed as part of appellant's sentence on a plea of guilty to conspiracy to distribute and possess with intent to distribute heroin in violation of 21 U.S.C. §846. The only question on appeal is whether the district court had the power under that statute to impose a special parole term. That question has been answered in the affirmative by a recent decision of this court, which was filed after the submission of appellant's brief on this appeal. See Alphonse Bifulco v. United States, No. 79-2024, slip op. at 2845, 2847-52 (2d Cir. May 30, 1979). That case is entirely dispositive of this appeal, and we therefore affirm the order of the district court.

Application was thereupon made for rehearing, with suggestion for rehearing en banc. It was argued that the decision in Bifulco failed to address the plain statutory language of 21 U.S.C. §846, was decided incorrectly, and should be overruled. The application for rehearing was denied on October 5, 1979.

While petitioner's rehearing application was pending, Mr. Bifulco filed a pro se petition for writ of certiorari, and certiorari was granted on October 9, 1979.

## REASONS FOR GRANTING THE WRIT

### 1. This Petition Presents The Question Identical To That Raised in Bifulco v. United States, Which Is Currently Pending Before This Court.

That this petition raises an important question is manifest from the fact that certiorari has already been granted on this question in Bifulco v. United States, (Docket No. 79-5010, certiorari granted, October 9, 1979). Therefore, the petition for a writ of certiorari should be granted; or alternatively, consideration of this petition should be postponed until the Bifulco case has been decided to allow disposition of this case in accordance with that decision.



### 2. There Is A Split Of Authority Among The Circuits With Regard To The Applicability Of The Special Parole Term Provision To Sentences Imposed Under 21 U.S.C. §846.*

A number of Circuit Courts of Appeals have concluded, as did the Second Circuit in Bifulco, that special parole must be included in a sentence imposed under 21 U.S.C. §846. See, e.g., United States v. Burman, 584 F.2d 1354 (4th Cir. 1978); United States v. Jacobson, 578 F.2d 863 (10th Cir.), cert. denied, 99 S. Ct. 324 (1978); United States v. Dankert, 507 F.2d 190 (5th Cir. 1975).

The Third Circuit has reached the opposite conclusion. United States v. Mearns, ___ F.2d ___ (3d Cir. June 15, 1979). And the District Court for the Central District of California has issued the same ruling. Fassette v. United States, 444 F. Supp. 1245 (C.D.Cal. 1978).

Thus, justice is not being dispensed uniformly in the various federal courts. A ruling by this Court deciding whether or not special parole is to be included in a sentence under 21 U.S.C. §846 is therefore necessary and proper.

### 3. The Second Circuit's Decision In Bifulco, Upon Constraint Of Which Petitioner's Claim On Appeal Was Rejected, Failed To Address The Plain Statutory Language of 21 U.S.C. §846.**

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*In its brief in response to Mr. Bifulco's pro se petition for writ of certiorari, in which it acquiesced to the granting of certiorari, the Office of the Solicitor General noted that the current split of authority among the Circuits constituted grounds for issuing the writ.

**Because this Court has agreed to review the Second Circuit's decision in Bifulco, petitioner will not herein advance in full those claims which will be presented in the Bifulco case respecting the proper interpretation of 21 U.S.C. §846, but instead will outline only the most apparent anomoly in the Second Circuit's decision relating to the plain statutory language.

Having been convicted on a plea of guilty to participating in a narcotics conspiracy (21 U.S.C. §846), petitioner was subject to punishment which, in the words of that section, was to consist of "imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or the conspiracy."

This statutory expression is sufficiently clear in its context to warrant reliance on the language itself as the primary determinant of Congressional intent in 21 U.S.C. §846.* The express language provides that a person convicted of conspiracy under that section faces punishment consisting of a fine or imprisonment or both; special parole, which constitutes a third form of punishment under 21 U.S.C. §841 (the substantive statute) is not enumerated. Accordingly, giving the words of the provision their ordinary meaning for interpretative purposes,** the only form of punishment authorized for violating 21 U.S.C. §846 is a fine or imprisonment; a special parole term, not being a fine, may be imposed only if it constitutes imprisonment.

That special parole is not considered imprisonment under this statutory scheme is evident from its description in 21 U.S.C. §841(b)(1)(A). Special parole is there discussed separately from fines and imprisonment, and is said to be "in addition to, and not in lieu of, any other parole provided for by law." Consequently, special parole and imprisonment are intended to be distinct and separate punishments. By its express reference to "imprisonment," 21 U.S.C. §846 incorporates only that

*See, e.g., Greyhound Corp. v. Mt. Hood Stages, Inc., 437 U.S. 322, 330 (1978); Ernst and Ernst v. Hochfelder, 425 U.S. 185, 197 (1976); United States v. Bass, 404 U.S. 336, 339 (1971); G.A.F. Corp. v. Milstein, 453 F.2d 709, 716 (2d Cir. 1971), cert. denied, 406 U.S. 910 (1972).

**See, e.g., Burns v. Alcala, 420 U.S. 575, 580-581 (1975); Banks v. Chicago Grain Trimmers Ass'n., 390 U.S. 459, 465 (1968); Malat v. Riddell, 383 U.S. 569, 571 (1966); Bouie v. City of Columbia, 378 U.S. 347, 355-356 (1964); Kelly v. United States, 531 F.2d 1144, 1148-1149 (2d Cir. 1975); United States v. Blasius, 397 F.2d 203, 205-206 (2d Cir. 1968), cert. denied, 393 U.S. 1008 (1969).



which is imprisonment in the referenced section, 21 U.S.C. §841 -- an imprisonment separate and distinct from special parole. Therefore, under the language of these sections alone, there is no basis for imposing a term of special parole in connection with a 21 U.S.C. §846 sentence.

Moreover, there is additional evidence in the statutory language that special parole was not intended to be applicable to 21 U.S.C. §846 sentences, but is to be imposed only under 21 U.S.C. §841 or §845 (distribution to persons under age 21). In describing the operation of a special parole term, 21 U.S.C. §841(c) makes specific reference to special parole only with respect to 21 U.S.C. §§841 and 845:

> A special parole term imposed under this section or section 845 of this title may be revoked if its terms and conditions are violated. ... A special parole term provided for in this section or section 845 of this title shall be in addition to, and not in lieu of, any other parole provided for by law.

This conclusion is furthered by the fact that both 21 U.S.C. §841 and §845, in distinction to §846, make explicit reference to the inclusion of a special parole term to be imposed in conjunction with any prison sentence. 21 U.S.C. §841(b)(1)(A) provides: "Any sentence imposing a term of imprisonment under this paragraph shall ... impose a special parole term...." While 21 U.S.C. §846 refers to this section to determine the fine and/or imprisonment limits, punishment for violating 21 U.S.C. §846 is imposed under that paragraph itself, not under §841. Thus, the quoted statement in §841(b)(1)(A) indicates an intention to include a special parole term for a violation specifically of §841. As to §845, the contrast with §846 is perhaps even more revealing. 21 U.S.C. §845 separately incorporates the sentencing limits of 21 U.S.C. §841 as to imprisonment and/or fine on the one hand (21 U.S.C. §845(a)(1) and §845(b)(1)) and special parole on the other (21 U.S.C. §845(a)(2) and §845(b)(2)). Thus, in the section immediately preceding 21 U.S.C. §846, Congress explicitly distinguished between imprisonment and/or fine and special parole,

thereby indicating that reference to imprisonment and/or fine alone, as in §846, does not incorporate the special parole provision.

## CONCLUSION

For the foregoing reasons, a writ of certiorari should issue; alternatively, consideration of this petition should be postponed until decision is rendered in Bifulco v. United States.

Respectfully submitted,

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Attorneys for the Petitioner.



# United States Court of Appeals

FOR THE

SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 26th day of June, one thousand nine hundred and seventy-nine.

Present:

HONORABLE STERRY R. WATERMAN

HONORABLE WILFRED FEINBERG

HONORABLE WILLIAM H. TIMBERS

Circuit Judges,

SANTOS SEPULVEDA,

Petitioner-Appellant,

- against -

UNITED STATES OF AMERICA,

Respondent-Appellee.

78-2164

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is AFFIRMED.

This is an appeal from an order denying a motion made pursuant to 28 U.S.C. § 2255 challenging the legality of a special parole term that Judge Bramwell imposed as part of appellant's sentence on a plea of guilty to conspiracy to distribute and possess with intent to distribute heroin in violation of 21 U.S.C. § 846. The only question on appeal is whether the district court had the power under that statute to impose a special parole term. That question has been answered in the affirmative by a recent decision of this court, which was filed after the submission of appellant's brief on this appeal. See Alphonse Bifulco v. United States, No. 79-2024, slip op. at 2845, 2847-52 (2d Cir. May 30, 1979). That case is entirely dispositive of this appeal, and we therefore affirm the order of the district court.

STERRY R. WATERMAN

WILFRED FEINBERG

WILLIAM H. TIMBERS

Circuit Judges



# United States Court of Appeals

## SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the fifth day of October , one thousand nine hundred and seventy-nine.

Present: HON. STERRY R. WATERMAN

HON. WILFRED FEINBERG

HON. WILLIAM H. TIMBERS

*Circuit Judges.*

| | |
|---|---|
| Santos Sepulveda<br>Petitioner-Appellant<br><br>v.<br><br>United States of America and Warden,<br>United States Penitentiary, Lewisburg, Pa.<br>Respondent-Appellee | 78-2164 |

A petition for a rehearing having been filed herein by counsel for the appellant Santos Sepulveda

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

A. DANIEL FUSARO
Clerk

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the fifth day of October, one thousand nine hundred and seventy-nine.

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Santos Sepulveda,

Petitioner-Appellant

v. 78-2164

United States of America and Warden, United States Penitentiary, Lewisburg, Pa.,

Respondent-Appellee

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A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the appellant Santos Sepulveda, and no active judge or judge who was a member of the panel having requested that a vote be taken on said suggestion.

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

Irving R. Kaufman

Chief Judge

FILED
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U. S. DISTRICT COURT E.D. N.Y.
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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

SANTOS SEPULVEDA,

Petitioner,

-against-

UNITED STATES OF AMERICA and WARDEN, United States Penitentiary, Lewisburg, Pa.

Respondents.

DECISION AND ORDER

78 C 814
(75 CR 976)

BRAMWELL, D. J.

After pleading guilty to a charge of conspiring to distribute and to possess with intent to distribute heroin in violation of 21 U.S.C. §846 (1970), Santos Sepulveda was sentenced by this Court to a five year imprisonment term plus a five year special parole term. Thereafter, by application filed on April 25, 1978, Mr. Sepulveda (hereinafter "petitioner") moved for a writ of habeas corpus pursuant to 28 U.S.C. §2255 (1970) on the ground that said sentence is illegal in that it is in excess of the maximum sentence authorized by law.

Specifically, the petitioner attacks the imposition of a five year special parole term. He claims that since 21 U.S.C. §846 (1970) makes no mention of a special parole term, the Court erred in imposing one as a sentence. He thus concludes that his sentence is illegal and the relief requested must issue. This Court disagrees with such a conclusion.

A reading of section 846 reveals that punishment under that section is limited by the "maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy." 21 U.S.C. §846 (1970). In this case, the petitioner plead guilty to a charge of conspiring to distribute and to possess with intent to distribute heroin. Thus, the object of the conspiracy was a violation of 21 U.S.C. §841 (1970). Accordingly, it was proper to sentence the petitioner pursuant to the provisions of section 841. See United States v. Wiley, 519 F.2d 1348, 1349, 1351 (2d Cir. 1975), cert. denied, 423 U.S. 105 (1976). Since heroin is a Schedule I narcotic drug, see 21 U.S.C. §812(c) (1970), under section 841 (b)(1)(A), a minimum special parole term of at least three years in addition to any term of imprisonment had to be imposed as a sentence. Therefore, the imposition of a five year special parole term in the instant case was clearly not illegal and was not imposed in contravention to the laws of the United States. See 28 U.S.C. §2255 (1970).

With this conclusion in mind, neither the issuance of an order to show cause nor a hearing on the petitioner's claim is warranted. See Rule 4, Rules Foll. 28 U.S.C. §2255 (1970). Accordingly, the petitioner's request for relief pursuant to 28 U.S.C. §2255 is hereby denied and this action



is hereby dismissed.

The Clerk of this Court is directed to send a copy of this Decision and Order to the petitioner and the respondents named herein.

Henry Bramwell
U. S. D. J.

Dated: Brooklyn, New York
June 14th, 1978

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U.S. DISTRICT COURT E.D.N.Y.
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P.M.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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SANTOS SEPULVEDA,

Petitioner,

-against-

UNITED STATES OF AMERICA and
WARDEN, United States Penitentiary
Lewisburg, Pa.

Respondents.

78 C 814
(75 CR 976)

DECISION
AND ORDER

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BRAMWELL, D. J.

By application filed on April 25, 1978, Santos Sepulveda, the petitioner herein, moved this Court for relief pursuant to 28 U.S.C. §2255 (1970) on the ground that his sentence is illegal and in excess of the maximum sentence authorized by law. Specifically, Mr. Sepulveda argued that since 21 U.S.C. §846 (1970) makes no mention of a special parole term, the sentencing court erred in imposing one as part of his sentence. After due consideration of this claim, by Decision and Order dated June 14, 1978, Mr. Sepulveda's motion was denied and his petition dismissed.

By application filed on June 28, 1978, Mr. Sepulveda now approaches this Court for a reconsideration of this petition and its subsequent dismissal. In support of this motion, he directs this Court's attention to Fassette v.





United States, 444 F.Supp. 1245 (C.D. Cal. 1978), a case which he cites for the proposition that the imposition of a special parole term for a violation of 21 U.S.C. §846 is illegal.

Initially, it must be noted that Fassette v. United States is a case arising in a California district court not a New York court, and, although noteworthy, it is not binding on this court. This court, however, is bound by the decisions of the United States Court of Appeals for the Second Circuit which continually has recognized the validity of the inclusion of a special parole term in the sentence for a drug conspiracy offense. In United States v. Wiley, 519 F.2d 1348 (2d Cir. 1975), for example, the Second Circuit held that a sentence of 7 years plus a 3 year special parole term for a violation of 21 U.S.C. § 846 was well within the statutory limits and was fixed within the sound discretion of the trial court.

For these reasons , a rehearing in petitioner's case would be an act without meaning. Accordingly, a rehearing on this petition is denied in all respects, and this petition remains dismissed.

The Clerk of this Court is hereby directed to send a copy of this Decision and Order to the petitioner and respondents named herein.

Henry Bramwell
U. S. D. J.

Dated: Brooklyn, New York
July 31st, 1978

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- - - - - - - - - - - - - - - - - - - X

SANTOS SEPULVEDA,

Petitioner, 78 C 814

-against- (75 CR 976)

UNITED STATES OF AMERICA and WARDEN, United States Penitentiary, Lewisburg, Pa., DECISION AND ORDER

Respondents.

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BRAMWELL, D. J.

By application filed on April 25, 1978, Santos Sepulveda, the petitioner herein, moved this Court for relief pursuant to 28 U.S.C. §2255 (1976) on the ground that his sentence is illegal and in excess of the maximum sentence authorized by law. Specifically, Mr. Sepulveda argued that since 21 U.S.C. §846 (1976) makes no mention of a special parole term, the sentencing court erred in imposing one as part of his sentence. After due consideration of this claim, by Decision and Order dated June 14, 1978, Mr. Sepulveda's motion was denied and his petition dismissed.

By application filed on June 28, 1978, Mr. Sepulveda approached this Court for a reconsideration of the June 14, 1978 dismissal order. After due deliberation, by Decision





dated June 31st, 1978, this Court declined to accept Mr. Sepulveda's invitation to overturn the June decision and, instead, reaffirmed the dismissal.

Mr. Sepulveda now requests this Court for permission to proceed in forma pauperis to the Second Circuit Court of Appeals pursuant to Rule 24 of the Federal Rules of Appellate Procedure. Of note in this respect is that the Court's research has disclosed that only two courts have been presented with the precise issue of whether a special parole term can be imposed for a violation of 21 U.S.C. §846 (1976). In United States v. Jacobson, 578 F.2d 863 (10th Cir. 1978), the Tenth Circuit found that a defendant who was convicted of conspiracy under section 846 but not of any substantive violation of section 841 was properly sentenced to a special parole term. Id. at 867-868. However, a California district court reached the contrary conclusion in Fassett v. United States, 444 F.Supp. 1245 (C.D. Cal. 1978) wherein the Court held that no special parole term could be imposed under section 846. Id. at 1247. Although in both United States v. Armedo-Sarmiento, 545 F.2d 785, 794-95 (2d Cir. 1976), cert. denied, 430 U.S. 917 (1977) and United States v. Wiley, 519 F.2d 1348, 1351 (2d Cir. 1975), cert. denied, 423 U.S. 1058 (1976) the Second Circuit approved sentences which included special parole terms imposed for violation of

section 846, the specific issue raised herein by Mr. Sepulveda was not presented for decision. See also United States, v. Madonna, No. 78-1131 (2d Cir. Sept. 1, 1978). Nonetheless, this Court adheres to its June 14, 1978 Decision and Order which agrees with the Tenth Circuit's resolution of this issue.

Returning to the instant application, after reviewing the papers submitted therewith, this Court grants Mr. Sepulveda leave to appeal in forma pauperis to the Second Circuit Court of Appeals. The Clerk of this Court is hereby directed to send a copy of this Decision and Order to the petitioner and the respondents named herein.

Henry Bramwell
U. S. D. J.

Dated: Brooklyn, New York
December 5th, 1978

FPI—SST—6-27-77

CORRECTED COPY

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 954—August Term, 1978.

(Submitted April 30, 1979 Decided May 30, 1979.)

Docket No. 79-2024

ALPHONSE BIFULCO,

*Petitioner-Appellant,*

—v.—

UNITED STATES OF AMERICA,

*Respondent-Appellee.*

Before:

GURFEIN and MESKILL, *Circuit Judges,* and WYZANSKI, *District Judge.**

Appeal *pro se* from an order of the United States District Court for the Eastern District of New York, Mark A. Costantino, *Judge,* denying motion for relief under 28 U.S.C. § 2255. The Court of Appeals held that the trial court neither lacked subject matter jurisdiction over appellant's conviction under 21 U.S.C. § 846 nor imposed an illegal sentence under that section.

Affirmed.

* Hon. Charles E. Wyzanski, Jr., United States District Judge for the District of Massachusetts, sitting by designation.

Alphonse Bifulco, Danbury, Connecticut (Robert E. Winkle, Danbury, Connecticut, on the brief), *for Appellant Pro Se.*

Edward R. Korman, United States Attorney, Eastern District of New York, Harvey M. Stone, Rodney G. Smith, Assistant United States Attorneys, Eastern District of New York, *for Appellee.*

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PER CURIAM:

This is an appeal *pro se* from an order of the United States District Court for the Eastern District of New York, Mark A. Costantino, *Judge,* denying appellant Alphonse Bifulco's motion for relief pursuant to 28 U.S.C. § 2255. We regard appellant's two claims on appeal as meritless and we affirm the order entered below.

Appellant was indicted on three drug-related counts, one count charging him under 21 U.S.C. § 846 with conspiracy to manufacture, distribute, and possess with intent to distribute substantial quantities of phencyclidine, a Schedule III controlled substance, in violation of 21 U.S.C. § 841(a)(1), and the other two counts charging him with substantive violations of § 841(a)(1). After a jury trial, appellant was convicted on the conspiracy charge and acquitted on the substantive charges. On June 3, 1977, he was sentenced to four years' imprisonment, a special parole term of five years and a $1,000 fine. This Court affirmed his conviction without opinion on December 15, 1977. Subsequently appellant, *pro se,* moved to vacate his sentence under 28 U.S.C. § 2255. The motion was denied by the district court and this appeal followed.



Appellant presents two claims for our consideration. The gist of the first argument is that the trial court lacked subject matter jurisdiction over his trial and conviction on the conspiracy count, in the absence of evidence proving a substantive offense as the object of the conspiracy, on the theory that no offense against the United States had been proven. As this argument attacks the jurisdiction of the trial court, we will overlook appellant's failure to raise this objection in the § 2255 motion presented to the district court. Reaching the merits, we must reject appellant's argument as utterly without foundation. Congress explicitly defined conspiracy under § 846, standing alone, as a federal crime. A defendant need not be charged with any other violation in order to be tried and convicted under § 846. *See, e.g., United States v. Lyles,* 593 F.2d 182 (2d Cir.), *cert. denied,* 47 U.S.L.W. 3636 (U.S. Mar. 26, 1979). Moreover, a defendant charged with both a § 846 conspiracy and a substantive violation of § 841 may be lawfully convicted on the former and acquitted on the latter. *See, e.g., United States v. Lubrano,* 529 F.2d 633 (2d Cir. 1975), *cert. denied,* 429 U.S. 818 (1976). *See generally Callanan v. United States,* 364 U.S. 587 (1961) (noting distinctiveness of conspiracy to commit a particular offense and actual commission of that offense).

Appellant's second contention, which was raised below, is that the imposition on him of a special parole term, in addition to incarceration, is an impermissible expansion of the sentencing provisions of 21 U.S.C. § 846. We disagree.

Section 846 provides:

> Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by *imprisonment or fine or both* which may not exceed

> the *maximum punishment* prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

(emphasis added). Appellant argues in his brief that the "maximum punishment" spelled out in § 846 refers to the maximum imprisonment or fine prescribed for violations of the substantive offenses covered by 21 U.S.C. § 841(b). He claims that the legislative history demonstrates a congressional intent to exclude the special parole mandated by 21 U.S.C. § 841(b). Therefore, he reasons, the addition of a period of special parole to his sentence of imprisonment and fine was an illegal sentence under 21 U.S.C. § 846. The only authority we have found that supports appellant's interpretation of the sentencing provisions of § 846 is *Fassette v. United States*, 444 F.Supp. 1245 (C.D. Cal. 1978). The *Fassette* court interpreted § 846 as "not permitting all of the types and kinds of punishment prescribed for the substantive offense but permitting only fine and imprisonment which shall not exceed the maximum fine and imprisonment prescribed for the substantive offense." *Id.* at 1247 (footnote omitted). The court's expressed hope that the Ninth Circuit would rule on the issue, *id.* at 1248, has gone unfulfilled.

The weight of authority is to the contrary. In *United States v. Armedo-Sarmiento*, 545 F.2d 785, 794-95 (2d Cir. 1976), *cert. denied*, 430 U.S. 917 (1977), and *United States v. Wiley*, 519 F.2d 1348, 1351 (2d Cir. 1975), *cert. denied*, 423 U.S. 1058 (1976), we gave our implicit approval to the type of sentencing challenged here without discussing or ruling on the claim raised by the appellant here. The Fifth Circuit in *United States v. De La Fuente*, 550 F.2d 309 (5th Cir. 1977), similarly gave its tacit approval to a sentence containing a special parole term for a violation



of § 846 without considering the argument proffered here.

In addition, the two circuit courts that have directly addressed this issue have both rejected the reasoning adopted in *Fassette* and urged upon us here by appellant. In *United States v. Burman*, 584 F.2d 1354, 1358 (4th Cir. 1978), the court stated:

> We think that a special parole term for violation of § 846 was properly included in Burman's sentence. The conspiracy statute, § 846, is punishable by a sentence which must be set by reference to the penalties of the substantive offense statute. A special parole term is automatically made part of the sentence prescribed by the substantive offense statute, § 841(b), anytime imprisonment is included in the sentence. We think that under this statutory scheme such a special parole term is required as a penalty under § 846 when a sentence of imprisonment is imposed because the substantive [offense] statute, § 841(b), would so require it and the terms "imprisonment or fine or both" only have meaning by reference to the sentences imposed under substantive offense statutes. Because we do not find Burman's special parole term of fifteen years to be excessive, we hold that the imposition of a special parole term of fifteen years by the district court for violation of § 846 was proper.

The Tenth Circuit relied on a similar analysis in rejecting the interpretation pressed here by the appellant:

> From the wording in § 841(b)-(c), it would appear that Congress viewed the special parole term as being a part of the term of imprisonment to which it was appended. Paragraphs (1) to (3) of § 841(b) all make a special parole term mandatory whenever imprison-

ment is also imposed. Thus, a parole term may never be imposed without imprisonment; it must always accompany imprisonment. Section 841(c) provides, in addition, that violation of the special parole may result in an increase in the original term of imprisonment to the extent of the length of the special parole term. It is impossible, therefore, to accept the argument that the parole term is to be imposed only where the charge is violation of the substantive provision. It is logical to view the reference to imprisonment in § 846 as intending to incorporate all of the imprisonment provision in § 841(b).

*United States v. Jacobson*, 578 F.2d 863, 868 (10th Cir. 1978).

We note too that in a closely analogous case, *United States v. Dankert*, 507 F.2d 190 (5th Cir. 1975), the Fifth Circuit upheld the imposition of a special parole term in addition to imprisonment under 21 U.S.C. § 963. Section 963 prohibits conspiracy to import, rather than manufacture, controlled substances; the corresponding substantive sections, §§ 952(a)(1) and 960(b)(1), punish the actual importation of these substances, and as such, they are companion sections to the substantive offense section involved in the instant appeal. In *Dankert* the appellant made the argument, similar to that advanced by appellant Bifulco, that § 963 does not include the special parole term provision of § 960(b)(2). Section 963 provides:

> Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by *imprisonment or fine or both* which may not exceed the *maximum punishment* prescribed for the offense, the commission of which was the object of the attempt or conspiracy.



(emphasis added). The *Dankert* Court rejected the interpretation proffered by appellant:

> The punishment provision of § 963 must be considered in light of §§ 952(a) and 960, since it is these statutes which define the offense which was the object of the conspiracy, and provide for punishment therefor. They provide:
>
> § 952(a) It shall be unlawful to import . . . [certain] controlled substance[s] . . . .
>
> • • • •
>
> § 960(a)(1)
>
> Any person who—
>
> contrary to section 952, 953, or 957 of this title, knowingly or intentionally imports or exports a controlled substance,
>
> • • • •
>
> shall be punished as provided in subsection (b) of this section.
>
> § 960(b)(1)
>
> In the case of a violation under subsection (a) of this section with respect to a narcotic drug in schedule I or II, the person committing such violation shall be imprisoned not more than fifteen years, or fined not more than $25,000, or both. If a sentence under this paragraph provides for imprisonment, the sentence shall include a special parole term of not less than three years in addition to such term of imprisonment.
>
> • • • •

> We have no trouble whatever in understanding the language of § 963 to permit punishment not exceeding that provided for an offense in violation of § 952(a).

*Id.* at 191.

We agree with the position taken by the Fourth, Fifth and Tenth Circuits on this issue. Therefore, we affirm the order of the district court denying appellant's § 2255 motion.



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No. 79-5584

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

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SANTOS SEPULVEDA, PETITIONER

v.

UNITED STATES OF AMERICA

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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MEMORANDUM FOR THE UNITED STATES

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WADE H. McCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

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MEMORANDUM FOR THE UNITED STATES

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Petitioner contends (Pet. 2, 5-9) that the district court erred by imposing a special parole term as part of his sentence for conspiracy to violate federal narcotics laws.

Following a plea of guilty, petitioner was convicted in the United States District Court for the Eastern District of New York on one count of conspiring to distribute heroin and to possess heroin with intent to distribute it, in violation of 21 U.S.C. 846. He was sentenced to five years' imprisonment to be followed by a five year term of special parole.

Petitioner subsequently filed a motion under 28 U.S.C. 2255 claiming that imposition of the special parole term was not authorized for the conspiracy offense. The district court denied the motion as well as a subsequent motion for reconsideration (Pet. Apps. D, E). The court of appeals affirmed (Pet. App. A).



The question presented in this case is identical to that presented in Bifulco v. United States, No. 79-5010, petition for certiorari granted October 9, 1979.[1] In that case, the court of appeals held that it is proper to impose a special parole term for a drug conspiracy in violation of Section 846 whenever such a term is required for the underlying substantive offense. Bifulco v. United States, 600 F.2d 407, 409-410 (2d Cir. 1979). With one exception,[2] every court of appeals to have considered this question has reached the same conclusion. See United States v. Sellers, 603 F.2d 53 (8th Cir. 1979), petition for certiorari pending, No. 79-5485, Cantu v. United States, 598 F.2d 471, 472 (5th Cir. 1979); United States v. Burman, 584 F.2d 1354, 1357-1358 (4th Cir. 1978), cert. denied, 439 U.S. 1111 (1979); United States v. Jacobson, 578 F.2d 863, 867-868 (10th Cir.), cert. denied, 439 U.S. 932 (1978). We believe that these decisions are correct and that imposition of a special parole term as part of petitioner's sentence was proper. Nonetheless, because this question is presently before the Court, we agree with petitioner (Pet. 5-6) that the Court should defer consideration of this petition until Bifulco is decided and dispose of this case in light of its holding in Bifulco.

Respectfully submitted.

WADE H. McCREE, JR.
Solicitor General

DECEMBER 1979

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1/ We are sending petitioner's counsel copies of the government's response to the petition in Bifulco.

2/ United States v. Mearns, 599 F.2d 1296 (3d Cir. 1979), petition for certiorari pending, No. 79-415.